UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THOMAS SOURAN, KELLY REARDON, ROY WILKIE, CARMEN GONZALEZ, LOUIS RAMZY, ADAM SMITH, and MICAH LEWIS, individually, and on behalf of all other similarly situated individuals,	)	
Plaintiffs,	)	No.: 1:16-CV-6720 Honorable Charles R. Norgle, Sr.
v.	)	
GRUBHUB HOLDINGS INC., and GRUBHUB INC.,	)	
Defendants.	)	

DEFENDANT GRUBHUB'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO STAY

Henry Pietrkowski (SBN 6230048)
Reed Smith LLP
10 South Wacker Drive
Chicago, IL 60606-7507
Telephone: (312) 207-1000
Facsimile: (312) 207-6400
hpietrkowski@reedsmith.com

Thomas E. Hill *(admitted pro hac vice)*
Mara D. Curtis *(admitted pro hac vice)*
Reed Smith LLP
355 South Grand Avenue, Suite 2900
Los Angeles, California 90071
Telephone: (213) 457-8000
Facsimile: (213) 457-8080
thill@reedsmith.com
mcurtis@reedsmith.com

Counsel for Defendants

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INTRODUCTION

Defendants Grubhub Holdings Inc. and Grubhub Inc. ("Grubhub") have moved to dismiss or stay this putative class action in favor of individual arbitration proceedings based on the clear arbitration provisions in the Plaintiffs' contracts and certain Plaintiffs' prior initiation of individual arbitrations. (Dkt. 34-35.) For much these same reasons, Grubhub opposes the conditional certification motion brought by Plaintiffs. (Dkt. 37.) Much of the briefing on the parties' competing motions has centered around the applicability or inapplicability of the Seventh Circuit's decision in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), which found that the class action waiver provisions in that case were unenforceable because they violated Section 8 of the National Labor Relations Act. While Plaintiffs contend that Grubhub's arbitration arguments are "doomed" by the *Lewis* decision (Dkt. 42 at 5), Grubhub has distinguished *Lewis* on a number of grounds: (1) Grubhub's arbitration agreement contains an opt-out provision, which the agreement in *Lewis* did not; (2) several Plaintiffs here waived their right to assert *Lewis* by initiating and actively prosecuting their own individual arbitration proceedings; and (3) *Lewis*' applicability turns on whether Plaintiffs are employees or independent contractors, which is an issue for an arbitrator to decide. (*See, e.g.*, Dkt. 35 at 5-9; Dkt. 37 at 8-12; Dkt. 45 at 2-7; Dkt. 59 at 1-6.)

On January 13, 2017, after briefing on the parties' above-described motions was completed, the United States Supreme Court granted the employer's petition for *certiorari* in *Lewis* to decide the following fundamental question:

> Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

Epic Systems Corp. v. Lewis, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285 (U.S. Jan.

13, 2017).[1] While this Court may choose to rule upon Grubhub's fully briefed motion to dismiss, which distinguishes the Seventh Circuit's *Lewis* decision in a number of material ways, the more economical option would be to stay this litigation until the Supreme Court decides the *Lewis* appeal, which could moot the issues currently pending before this Court.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants[.]" *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (*citing Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163 (1936)); *Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 980 (7th Cir. 2005) (quoting same language from *Landis*). The Supreme Court's decision in *Lewis* will be the final word on an issue that directly impacts Grubhub's arbitration arguments in this matter. Accordingly, in the interest of economy of time and effort for this Court, for counsel, and for the litigants, these proceedings should be stayed pending the outcome of *Lewis* in the Supreme Court.

FACTUAL AND PROCEDURAL BACKGROUND

On June 28, 2016, Plaintiffs Thomas Souran, Kelly Reardon, Roy Wilkie, Carmen Gonzalez, Louis Ramzy, Adam Smith, and Micah Lewis filed their Complaint alleging Grubhub violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, along with several state wage and hour laws. (Dkt. 1.) In their First Amended Complaint ("FAC"), Plaintiffs alleged they are employees, not independent contractors, of Grubhub and therefore are afforded

[1] The Seventh Circuit's *Lewis* decision, similar to the Ninth Circuit holding in *Ernst & Young v. Morris*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, No. 16-300 (U.S. Jan. 13, 2017), held that an employer-required arbitration agreement containing a class/collective action waiver but no opt-out provision violated the National Labor Relations Act, 29 U.S.C § 151 *et seq*., ("NLRA") and was unenforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., ("FAA"). However, this holding conflicted with the decisions of several other Circuits, including *N.L.R.B. v. Murphy Oil USA, Inc.*, *et al*, 808 F.3d 1013 (5th Cir. 2016), *cert. granted*, No. 16-307 (U.S. Jan. 13, 2017). Therefore, the Supreme Court granted the *Lewis*, *Morris*, and *Murphy Oil* petitioners' requests for writ of *certiorari* and consolidated the matters for argument.

protections under the FLSA. (Dkt. 16 at ¶ 26.) Plaintiffs further asserted that because they are employees and are required to pay expenses necessary to perform their job functions, their weekly pay rates have often fallen below federal or state minimum wage requirements. (*Id*. at ¶¶ 37-38.) Additionally, Plaintiffs averred that while they regularly worked more than forty hours per week, Grubhub failed to pay them overtime wages as required. (*Id*. at ¶ 44.) On July 22, 2016, Plaintiffs moved for conditional certification of a collective action under the Fair Labor Standards Act, 29 U.S.C. § 216(a). (Dkt. 17.) Grubhub responded by filing a Motion to Dismiss Plaintiffs' FAC, or, in the alternative, to Stay All Proceedings. (Dkt. 34.)

Throughout this action, Plaintiffs have relied primarily on the Seventh Circuit's decision in *Lewis* to support their claim that arbitration agreements and class/collective action waivers violate the NLRA and are unenforceable under the FAA. In *Lewis*, the employee plaintiff entered into an arbitration agreement with the employer defendant that contained a class action waiver. *Lewis*, 823 F.3d at 1151. The plaintiff was required to execute the arbitration agreement in order to keep his job. *Id.* Despite the agreement, the plaintiff filed a putative collective/class action in federal court, and the employer then moved to compel individual arbitration, relying on the arbitration agreement and the class action waiver contained therein. *Id.* The district court held that the arbitration agreement was invalid because it violated the NLRA. *Id.* The Seventh Circuit affirmed, explaining that the class action waiver violated Section 8 of the NLRA by precluding employees from engaging in concerted activity. *Id.* at 1155. On January 13, 2017, however, the U.S. Supreme Court granted Petitioner's request for writ of *certiorari* in *Lewis* to resolve the issue of whether arbitration agreements containing class action waivers violate the NLRA, and are therefore unenforceable. That appeal was consolidated with the *Morris* appeal from the Ninth Circuit and the *Murphy Oil* appeal from the Fifth Circuit.

ARGUMENT

The Supreme Court's forthcoming decision in *Lewis* will likely determine whether Plaintiffs' putative class claims against Grubhub should be stayed or dismissed in favor of individual arbitration claims. Considering the substantial possibility that the Supreme Court's ruling will definitively foreclose Plaintiff's reliance on the aforementioned *Lewis* decision, this case should be stayed to promote judicial efficiency and conserve litigants' resources. Moreover, given the direct impact such a decision would have on this case and the relatively short duration of the stay, Plaintiffs cannot credibly claim prejudice from such a stay.

I. Legal Standard

A trial court "may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Marseilles Hydro Power, LLC. v. Marseilles Land & Water Co*., 00-cv- 1164, 2003 WL 259142, at *4 (N.D. Ill. Feb. 4, 2003). In deciding whether to grant a stay, a district court has broad discretion and courts in this Circuit typically consider three factors: (1) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (2) whether a stay will simplify the issues in question and streamline the trial; and (3) whether a stay will reduce the burden of litigation on the parties and on the court. *See Conrad v. Boiron, Inc.*, No. 13-C-7903, 2014 WL 2937021, at *3 (N.D. Ill. June 30, 2014).

Courts have found it appropriate to defer proceedings until the resolution of similar issues in higher courts. *See, e.g., Tel. Sci. Corp. v. Asset Recovery Solutions., LLC*, 15-C-5182, 2016 WL 47916, at *2, 4, 6 (N.D. Ill. Jan. 5, 2016) (granting a stay pending the resolution of an issue before the Supreme Court "to advance [the] litigation by promoting efficiency and economy for the proper basis of the allegations and claims that may proceed into discovery"); *Hannahan Endodontic Group, P.C. v. Inter-Med, Inc.*, No. 15-C-1038, 2016 WL 270224 (E.D. Wis. Jan. 20,

2016) (noting that awaiting a decision from the Supreme Court regarding an issue that could be dispositive of the case would provide "enormous potential to simplify the issues in this case and reduce the burden of litigation").

II. A Stay Will Not Prejudice Plaintiffs.

Plaintiffs cannot show any prejudice from the delay in the proceedings pending resolution of *Lewis*. *See Asset Recovery*, 2016 WL 47916, at *5 (noting that a stay in the district court will not unduly prejudice a non-moving party when the Supreme Court's decision will likely be issued before a final district court decision).

Here, this motion seeks a stay pending resolution of a matter that already has been granted a writ of *certiorari* and is in the process of being briefed and argued in the United States Supreme Court. With an opinion resolving this matter forthcoming, there is no reason a short delay would prejudice Plaintiffs.

Further, although Plaintiffs may disagree, the more likely scenario is that their interests are *protected*, rather than prejudiced, by a stay. Considering the substantial amount of resources that will go into this case in the next several months if not stayed, including extensive discovery and motion practice, Plaintiffs and their counsel could invest significant time and money in this case for no good reason. Without a stay, the parties would all suffer great harm from the burden of potentially superfluous litigation. *See Asset Recovery*, 2016 WL 47916, at *5 (granting stay of litigation early "equates to a potential for significant savings for both parties in terms of their time, expenses, and resources required to move forward"). A short stay to await a precedential ruling, therefore, is in the best interest of all parties.

III. A Stay Of Proceedings Will Reduce The Burden Of Litigation On Both The Parties And The Court.

If this case is not stayed and the Court denies Grubhub's pending motion to dismiss, a substantial amount of the parties' and the Court's time and resources will be consumed by extensive discovery, additional motion practice and other litigation activity. It makes little sense to undertake the significant expenditures of time, resources, and costs to proceed with Plaintiffs' claims, either individually or as a class, which may ultimately be wiped away with one decision by the United States Supreme Court. If this case is not stayed, Grubhub may be required to defend a putative class action even though the Supreme Court's decision in *Lewis* could render the time and costs of such defense entirely pointless. This was a key reason why other courts in this district have granted stays pending the resolution of matters with similar issues before the Supreme Court. *See, e.g.*, *Asset Recovery*, 2016 WL 47916, at *6 (finding a stay appropriate when the decision of the Supreme Court on the same issue would be dispositive).

Plaintiffs' proposed class could number in the hundreds, if not thousands. Many of Plaintiffs' proposed class members agreed to arbitrate these claims and waived their rights to bring a class/concerted action claim. The pending Supreme Court decision in *Lewis* could preserve this Court's precious judicial resources by sending every employee to individually arbitrate their claims as he or she agreed to do. Although Grubhub denies Plaintiffs' allegations and further believes that the Court should dismiss this putative class action in favor of individual arbitrations under current Seventh Circuit law, if this case is not stayed and denies Grubhub's motion to dismiss based on an interim Seventh Circuit ruling, Grubhub would face a significant hardship and inequity. Therefore, staying these proceedings pending the resolution of *Lewis* would significantly reduce the overall burden of litigation on both this Court and the litigants.

IV. A Stay Of Proceedings Is Appropriate Because *Lewis* Will Potentially Have A Dispositive Effect On Plaintiffs' Claims.

Finally, the Supreme Court's upcoming decision in *Lewis* should finally determine, one way or the other, whether Plaintiffs can pursue this action in this judicial forum. If the Supreme Court agrees with the Second, Fifth, and Eighth Circuits that class action waivers in arbitration agreements are enforceable notwithstanding the protections for concerted activity set forth in the NLRA, Plaintiffs will not be able to pursue their claims in this judicial forum, either individually or as class members. By providing direct authority on this key question, the Supreme Court's decision will simplify the issues in this case and streamline this litigation by possibly sending the entire matter to arbitration.

CONCLUSION

For the foregoing reasons, Defendants Grubhub Holdings Inc. and Grubhub Inc. respectfully request that the Court grant their motion to stay all proceedings in this matter pending resolution of the United States Supreme Court's decision in *Lewis*.[2]

Dated: January 27, 2017

Respectfully submitted,

GRUBHUB HOLDINGS INC. and
GRUBHUB INC.,

By: */s/ Henry Pietrkowski*

Henry Pietrkowski (SBN No. 6230048)
Reed Smith LLP
10 South Wacker Drive
Chicago, IL 60606-7507
Telephone: (312) 207-1000
Facsimile: (312) 207-6400
hpietrkowski@reedsmith.com

[2] If the Court chooses not to grant this motion to stay, then the Court should grant Grubhub's pending motion to dismiss or stay in favor of individual arbitration (Dkt. 34), which is fully briefed and explains why the Seventh Circuit decision in *Lewis* does not apply to the facts of this case.

Thomas E. Hill *(admitted pro hac vice)*
Mara D. Curtis *(admitted pro hac vice)*
Reed Smith LLP
355 South Grand Avenue, Suite 2900
Los Angeles, California 90071
Telephone: (213) 457-8000
Facsimile: (213) 457-8080
thill@reedsmith.com
mcurtis@reedsmith.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, I filed the aforementioned **DEFENDANT GRUBHUB'S MOTION TO STAY PROCEEDINGS** on behalf of Defendants Grubhub Holdings Inc. and Grubhub Inc. with the Clerk of the United States District Court for the Northern District of Illinois, using the court's CM/ECF system which automatically serves all counsel of record.

By: /s/ *Henry Pietrkowski*